No. 80-772

In the Supreme Court of the United States

OCTOBER TERM, 1980

ENVIRONMENTAL DEFENSE FUND, INC., PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether a person who wishes to challenge as insufficiently restrictive the Environmental Protection Agency's determination that unconditional cancellation of all registered uses of a pesticide is not warranted is limited to the judicial remedy provided by statute, or is entitled also to compel the agency to hold a formal adjudicatory hearing.

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STATEMENT

1. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[1] requires all pesticides sold and distributed in the United States to be registered by the United States Environmental Protection Agency.[2] Before EPA will register a pesticide for a particular use, the applicant must demonstrate that the pesticide will cause no "unreasonable adverse effects on the environment."[3] However, even after registration, the agency may determine that the use of the pesticide does not satisfy this requirement, in which event the registration for that use must be cancelled or modified.[4] If a notice of intent to cancel is issued, cancellation of the registration occurs by operation of law at the end of 30 days, unless the registration is corrected or an administrative hearing under Section 6(b) of FIFRA is requested "by a person adversely affected by the notice."[5]

To facilitate the identification of pesticides which may cause "unreasonable adverse effects on the en-

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[1] FIFRA is codified at 7 U.S.C. (& Supp. III) 136-136y.

[2] Section 3(a) of the Act, 7 U.S.C. 136a(a). Under EPA practice, pesticides are registered on a use-by-use basis.

[3] Section 3(c)(5)(C) and (D), 7 U.S.C. (Supp. III) 136a(c)(5)(C) and (D).

[4] Section 6(b), 7 U.S.C. (Supp. III) 136d(b). Section 6 of FIFRA permits the Administrator of EPA the discretion to initiate the cancellation process either by issuing a "notice of his intent * * * to cancel" or a "notice of his intent * * * to hold a hearing to determine whether or not [a] registration should be canceled * * *."

[5] Section 6(b), 7 U.S.C. (Supp. III) 136d(b).

vironment," EPA has created the Rebuttable Presumption Against Registration ("RPAR") process.[6] This administrative process provides an efficient and comprehensive mechanism for gathering and evaluating information about the risks and benefits of continued use of a pesticide. To assure that all relevant information and all viewpoints are fully considered prior to any final administrative action, significant public participation is invited at critical points in the RPAR process.

2. The Agency's decision to issue the notice of intent to cancel the registration of certain uses of chlorobenzilate was reached at the end of an RPAR proceeding which extended over a period of almost three years. The RPAR review of chlorobenzilate commenced with the publication, in 1976, of a notice inviting written comments and submissions from all interested persons concerning the risks and benefits of the continued use of chlorobenzilate.[7] Many comments, including those of petitioner, Environmental Defense Fund ("EDF"), were submitted. After careful evaluation of all of the available information, the Administrator, in 1978, announced a preliminary determination of the risks and benefits of the various uses of chlorobenzilate.[8] The preliminary determination was then submitted to the Secretary of Agriculture, the FIFRA Scientific Advisory Panel, and interested members of the public, to provide an

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[6] The RPAR regulations are set out at 40 C.F.R. 162.11.

[7] 41 Fed. Reg. 21517 (1976).

[8] Notice of Determination Concluding the Rebuttable Presumption Against Registration and Continued Registration of Pesticide Products Containing Chlorobenzilate, 43 Fed. Reg. 29824 (1978).

opportunity for comment.[9] EDF submitted written comments on the preliminary determination and participated in an open public meeting conducted by the Scientific Advisory Panel.[10]

After consideration of all comments on the preliminary evaluation, received from the public, the Scientific Advisory Panel and the Secretary of Agriculture, the Administrator issued a notice of intent to cancel which was accompanied by a detailed analysis of the comments received and the changes in his preliminary determination made as the result of that analysis.[11] The Chlorobenzilate Notice provided for the unconditional cancellation of registration of all chlorobenzilate products for all uses other than citrus uses in Florida, Texas, California and Arizona. It also provided for the "conditional cancellation" of the remaining citrus uses; *i.e.*, those uses would be cancelled unless the registrations were amended to reflect specific modifications and restrictions which the Administrator determined were necessary to reduce the risk of continued use and for compliance with the statutory standard for registration.[12] Only EDF filed a timely request for a Section 6(b) hearing (Pet. App. 5a). EDF's sole complaint was that

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[9] The Act requires the Administrator to submit the preliminary determination to the Secretary of Agriculture (Section 6(b), 7 U.S.C. (Supp. III) 136d(b)) and the Scientific Advisory Panel (Section 25(d), 7 U.S.C. (Supp. III) 136w(d)).

[10] See 43 Fed. Reg. 32185 (1978).

[11] Notice of Intent to Cancel Registrations and Deny Applications for Registration of Pesticide Products Containing Chlorobenzilate, 44 Fed. Reg. 9548 (1979) (hereinafter cited as the "Chlorobenzilate Notice").

[12] Chlorobenzilate Notice, 44 Fed. Reg. 9551 (1979).

the Administrator's decision was inadequate for failing to cancel unconditionally all citrus uses.

On April 11, 1979, the Agency's Chief Administrative Law Judge issued *sua sponte* a notice to show cause why an accelerated decision should not be entered against EDF, pursuant to the agency's Rules of Practice.[13] On May 22, 1979, he issued the Accelerated Decision dismissing the objections of EDF and the proceedings which had been commenced thereunder.[14] EDF excepted to and appealed from the Accelerated Decision, and filed briefs before the Administrator in opposition to the dismissal (Pet. App. 5a, 3b).

On August 20, 1979, the Administrator issued his final Decision.[15] The Administrator affirmed EDF's

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[13] 40 C.F.R. 164. Section 164.91(a) of those Rules of Practice provides in pertinent part:

> § 164.91 *Accelerated decision.*
>
> (a) *General.* The Administrative Law Judge, in his discretion, may at any time render an accelerated decision in favor of Respondent as to all or any portion of the proceeding, including dismissal without further hearing or upon such limited additional evidence such as affidavits as he may receive, under any of the following conditions:
>
> (1) Untimely or insufficient objections filed pursuant to § 164.20;
>
> * * * * *
>
> (6) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel.

[14] Three other parties, California Citrus Quality Council, Florida Citrus Mutual and Florida Citrus Production Managers Association, filed objections but these were dismissed as untimely at the same time the EDF proceeding was dismissed.

[15] Pet. App. 1b-30b.

dismissal on the basis that EDF was not a "person adversely affected" by the Chlorobenzilate Notice within the meaning of Section 6(b) of FIFRA, because the Act provides administrative hearings under Section 6(b) only to persons who want to stop the cancellation actions initiated by a notice.[16] Persons who are aggrieved by a refusal of the agency to propose more restrictive actions, he determined, are afforded a statutory remedy in the courts.[17] The Administrator's opinion does not discuss the proper scope of a Section 6(b) hearing.[18]

3. EDF then petitioned the court of appeals for review of the Administrator's decision. The court ruled that EDF was not adversely affected to the extent that the Chlorobenzilate Notice cancelled uses of chlorobenzilate. The court further held that, to the extent the Notice provided for the retention of certain registered uses of chlorobenzilate, neither EDF nor any other person was entitled to challenge the results in a Section 6(b) administrative hearing.[19] The court never reached the question of the proper scope of a cancellation hearing when such a hearing is commenced at the request of the registrant or another person with statutory standing to require one.[20]

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[16] Pet. App. 21b-22b.

[17] Pet. App. 22b-23b.

[18] Pet. App. 25b-26b.

[19] Pet. App. 21a-33a.

[20] Pet. App. 25a n.64.

ARGUMENT

As the court of appeals noted, the issue presented is "very narrow." [21] It concerns only a limited category of administrative actions—those "conditional" cancellation proposals which are not contested by the registrant of the pesticide. The decision below does not conflict with that of any other circuit [22] or any ruling of this Court. Nor does the result here prevent effective challenge to the adequacy of EPA plans to reduce pesticide hazards, since petitioner or any other interested person has an explicit statutory right [23] to seek judicial review of the Administrator's failure to cancel a registration unconditionally. The decision below thus affects only the forum in which petitioner may challenge the Administrator's decision. In these circumstances, we submit the petition presents no issue warranting review by this Court.

1. If the Administrator, after informally examining a pesticide's risks and benefits, had decided to leave its registration undisturbed, and therefore had declined to issue a notice of intent to cancel, it is

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[21] Pet. App. 28a-29a.

[22] The Court of Appeals for the Ninth Circuit has very recently ruled on a jurisdictional question similar to an issue decided by the court below, but not raised by EDF here. In *Amvac Chemical Corp.* v. *EPA*, No. 79-7270 (Dec. 1, 1980), the court determined that jurisdiction to review a procedural order made during another cancellation proceeding lay in the district court and not in the court of appeals. The two cases, however, are factually distinguishable, and, indeed, the Ninth Circuit specifically determined that the case below was "not * * * applicable to the case before [them]." Slip op. 8. The Ninth Circuit was not presented with either of the issues raised by EDF here.

[23] Section 16, 7 U.S.C. 136n.

unquestioned that a private party would have no statutory right to compel an administrative hearing to argue that the registration should have been cancelled.[24] Similarly, if the registrant had decided to amend his registration to place new risk-reducing restrictions on the pesticide's use (either to avoid the threat of a notice of intent to cancel or for any other reason), and if the agency found the registration adequate as amended, no one would be entitled to a hearing before the Administrator because no cancellation notice would have issued.

The decision below dealt with a case which reached the same result—registrant agreement to accept risk-reducing provisions which the agency had announced would be sufficiently protective. However, here the registrant agreed to accept the agency's terms shortly *after* issuance of a notice of intent to cancel, rather than at some point before the notice issued. The lower court's decision merely says that this difference in the *timing* of a registrant's decision to accept agency-proposed restrictions does not warrant granting to persons like EDF what they would surely lack in any other situation—a right to compel EPA to hold an administrative adjudicatory hearing to argue for unconditional cancellation or other more severe restrictions.[25]

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[24] Any person, however, may petition the agency to cancel or restrict a pesticide's use, and may obtain judicial review of a refusal to do so. Section 16, 7 U.S.C. 136n. A reviewing court could then order EPA to hold a hearing if it found that one was needed.

[25] Contrary to EDF's claim that the decision in this case would restrict the right to request a hearing to "those parties who have an economic interest in reducing or eliminating new restrictions" (Pet. 7), the decision produces no such result. Any person who would be adversely affected by a prohibitory

On the other hand, the present ruling in no way inhibits any interested person or group from challenging the registration of a pesticide or the adequacy of conditions imposed on its use. Whether or not the Administrator has proposed any cancellation action, any person may petition him to totally cancel a registration or to impose additional restrictions. If the Administrator refuses, FIFRA explicitly provides for judicial review of his refusal.[26] The statute states, in pertinent part, that:

> Agency refusals to cancel or suspend registrations or change classifications not following a hearing * * * are judicially reviewable in the district courts.[27]

Thus, EDF and other interested persons may readily obtain review of final EPA pesticide decisions. The court below merely held that when review is sought because insufficient restrictions have been imposed, the proper forum is a federal court, not an administrative hearing under Section 6(b)(2).[28]

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aspect of the cancellation notice, whether the effect was economic or not, could compel a Section 6(b)(2) hearing. For example, if EDF opposed a cancellation because it believed that farmers would turn to a more dangerous substitute pesticide it would be entitled to a hearing under the decision below.

[26] Section 16, 7 U.S.C. 136n.

[27] Section 16(a), 7 U.S.C. 136n(a).

[28] The question of *which* federal court, district or appellate, would be the appropriate forum was not specifically before the court of appeals in this case. Although it is dictum, we should note that court's statement that "persons seeking more stringent regulation may sue in the *district court* without first enduring an administrative hearing." Pet. App. 32a-33a (emphasis deleted, emphasis in original).

Nor are persons in the position of petitioner precluded from having a meaningful voice at earlier stages. Under EPA's RPAR procedures, all interested members of the public have ample opportunity to participate in the decisionmaking process that leads to the issuance of a notice of intent to cancel a pesticide registration. Indeed, in the present case, EDF first submitted its views in response to the Federal Register notice announcing the commencement of the chlorobenzilate RPAR and requesting public comment. Next, after the Administrator published his preliminary determination of the appropriate regulatory action and solicited public comments, EDF again submitted written comments. Finally, EDF took part in a public hearing which the FIFRA Scientific Advisory Panel held to consider the Administrator's preliminary determination. Only after these steps did the Administrator issue his final notice of intent to cancel. By thus providing EDF and other interested members of the public ample opportunity to argue that a pesticide registration should be unconditionally cancelled, the Administrator assures that all relevant viewpoints will be fully considered in reaching his final position.

Moreover, the court of appeals' decision does not preclude EDF or any other interested person from taking an effective and meaningful part in future cancellation proceedings. Once the proceedings are validly initiated by a request from a person who would be adversely affected by a cancellation, any interested person may move to intervene.[29] Under the EPA's pro-

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[29] 40 C.F.R. 164.31(a).

cedural regulations, "[l]eave to intervene will be freely granted" and an intervenor "become[s] a party with the full status of the original parties to the proceedings." [30] Public interest groups, in fact, have frequently intervened and been granted full party status in Section 6(b) hearings.[31]

Whatever additional role a different decision below might have permitted, EDF's opportunity to participate both before and after the Administrator's decision to issue a cancellation notice remains extensive and adequate.

2. It is well established that this Court ordinarily will consider only issues that were adjudicated in the decision of the lower court for which review is sought.[32] It is accordingly unnecessary to address EDF's second question: "Is the relief * * * in § (6)(b)(1)[(2)] hearings limited only to less restrictive measures than those proposed by the Administrator?" [33]

The decision of the court of appeals turned upon its finding that EDF was not entitled to compel a Section 6(b) hearing. The court never reached the question of the appropriate scope of such a hearing, and, indeed,

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[30] 40 C.F.R. 164.31(c). The intervenor, however, may only raise "matters which are pertinent to and do not unreasonably broaden the issues already presented [in the proceeding]." *Ibid.*

[31] For example, EDF has intervened and participated in the cancellation hearings for DDT, Aldrin/Dieldrin, Heptachlor/Chlordane and Mirex, and is presently participating as an intervenor in the ongoing 2,4,5-T cancellation proceeding.

[32] See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312 (1971). See also Sup. Ct. R. 17.1.

[33] Pet. i.

twice expressly declined to resolve the issue.[34] Similarly, the Administrator's decision turned upon his finding that EDF was not a person adversely affected by the notice, and he too found it unnecessary to rule on the scope of the proceeding.[35]

Therefore, EDF is asking this Court to determine on first impression the scope of a properly initiated FIFRA Section 6(b)(2) hearing, although neither a

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[34] The court stated (Pet. App. 25a n.64):

> Because we conclude the request for a hearing was properly denied, we do not decide what issues are appropriate at a properly initiated hearing.

And, again (Pet. App. 29a):

> [W]e do not find it necessary to reach the question whether a party in a validly initiated hearing could expand the scope of the proceedings to consider restrictions more stringent than those proposed by the EPA.

[35] The Administrator's decision noted that EDF's attempt to introduce this issue

> is *premised* on [EDF's] assertion that it is a person "adversely affected" by the § 6(b)(1) notice, a statutory prerequisite to standing to request a hearing and file objections.

Pet. App. 8b-9b (emphasis in original). After he found EDF was *not* "adversely affected," his decision went on to state:

> EDF raises a number of other arguments * * *. For example, * * * that the Agency has broad authority under FIFRA to enlarge the scope of relief beyond what is proposed in the notice of intent to cancel * * *. These and all other arguments made by EDF have been considered and rejected as either being irrelevant or lacking in merit; in any event, they are not sufficient to overcome the conclusion that EDF is not "adversely affected * * *."

Pet. App. 25b-26b.

lower court decision nor even an administrative decision on the subject are before this Court.

3. The only question properly presented here is whether a person or group not disputing the prohibitory aspects of a proposed cancellation action is entitled, as of right, to compel a hearing in order to urge the agency to go further, when neither the registrant nor any user of the pesticide is contesting the action. We submit that the court below correctly answered in the negative.

Of course, arguments can be advanced in favor of affording an automatic administrative hearing to all those who are dissatisfied with the Administrator's decision not to ban absolutely specified pesticide uses. But that was never the scheme of the Act and the 1972 amendments did not intend to change the rule.

There is a consistent pattern in FIFRA that provides an administrative hearing only to those persons who contest a proposed restriction as too stringent. Those who believe EPA's position is not stringent enough may seek review only in court under Section 16 of the Act. Decisions to deny a registration may be challenged in an administrative hearing, but not decisions to grant a registration.[36] Decisions to suspend a registration are subject to an administrative hearing, but not decisions refusing to suspend.[37] So, too, decisions to cancel a registration may be challenged in an administrative hearing, but not refusals to cancel a registration.[38] It would be strange if

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[36] Section 3(c)(5)-(6), 7 U.S.C. (& Supp. III) 136a(c)(5)-(6).

[37] Section 6(c), 7 U.S.C. (& Supp. III) 136d(c).

[38] Section 6(b), 7 U.S.C. (Supp. III) 136d(b).

this otherwise consistent pattern were broken in one special case—when EPA finds that the imposition of new restrictions on specified uses eliminates what otherwise would be "unreasonable adverse effects" and issues a notice in those terms.

The illogic of EDF's position is emphasized by the effect that granting a hearing would have on the agency's proposed action. Under FIFRA, granting a request for a hearing postpones the effective date of the proposed action.[39] Under EDF's interpretation of FIFRA, EPA would have to delay imposition of its proposed protective measures simply because a member of the public asks for more extensive controls. The Administrator recognized this anomaly in EDF's position, and pointed out in his final decision in this case:

> The "internal logic" of FIFRA is structured so as to confer standing to request hearing and file objections on those persons who want to stop the Agency's proposed action from going into effect. Under § 6(b), the proposed action is self-executing: it becomes "final and effective" *unless* * * * a request for a hearing is made by a person "adversely affected" by the proposed action. EDF obviously has no interest in stopping the proposed action from going into effect, and it is clear that its objections were not filed for that purpose. * * * EDF complains, not of the action proopsed * * * it is the Agency's *refusal* to propose action * * * that is the source of EDF's objections.[40]

Congress clearly did not intend to allow a member of the public to stay the effectiveness of an en-

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[39] Section 6(b), 7 U.S.C. (Supp. III) 136d(b).

[40] Pet. App. 11b (emphasis in original).

vironmentally protective action by compelling a hearing to determine whether even more protection would have been appropriate. To the contrary, the Administrator of EPA has been given the sole authority and responsibility, subject to judicial review, to determine the regulatory action required to protect the environment and public health from the adverse effects of pesticide use. It is for him to determine whether to issue a cancellation notice.[41] If he concludes that no cancellation is necessary, the registrant should not be forced to undergo the lengthy and expensive process of an administrative hearing to *support* the agency's position. The scheme of the Act, we repeat, is to confide to the Administrator the decision whether a registrant must prove in an administrative hearing that its product qualifies for continued registration. Obviously, Congress was concerned not to allow undue interference with the agency's agenda and its allocation of limited resources.

EDF's claim that it is entitled to compel a hearing rests upon the grant of such a right to "persons adversely affected by the notice." [42] Examination of the

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[41] Section 6(b), 7 U.S.C. (Supp. III) 136d(b), provides that, when "*it appears to the Administrator* that a pesticide * * * does not comply with the provisions of this [Act] * * *, *the Administrator may issue* a notice * * *". (emphasis added)

[42] Pet. i, 9-12, 13. EDF's claim rests on what it alleges is the plain meaning of the term "adversely affected." It is well established, however, that the interpretation of a term in a statute must be based on the context in which it occurs. See, *e.g.*, *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956). When the quoted language is viewed in the context of the Section and the entire Act, the term "person adversely affected by the notice" is most appropriately interpreted as an abbreviated form of "person adversely affected by the notice" "of

1972 legislative history of the amendments which added this language, however, discloses that Congress was not focusing on persons wishing to compel more stringent regulations. The words "persons adversely affected" were added to give persons who might be injured by the prohibitory aspects of a cancellation notice, particularly the users of a pesticide, the right to demand a hearing on the proposed action. As the Fifth Circuit recently observed:

> The legislative history suggests that the rights of non-registrants were recognized in the statute because certain Congressmen were concerned that a pesticide producer would choose not to defend a particular registration that was of small importance to the manufacturer, but of great importance to a particular agricultural group. * * * [The] amendment was designed to protect the rights of users of established pesticides if the producer-registrant decided not to defend against cancellation or change of a particular registration.[43]

Indeed, registrants and users were thought by Congress in 1972 to be the *only* parties who could be "adversely affected" by a notice of cancellation. Under the pre-1972 Act, the Administrator was required unconditionally to issue such a notice if there was a substantial question of the safety of a pesti-

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* * * intent * * * to cancel [a pesticide's] registration." See Section 6(b), 7 U.S.C. (Supp. III) 136d(b).

[43] *McGill* v. *EPA*, 593 F.2d 631, 635-636 (5th Cir. 1979). The Administrator's Final Decision contains a review of the relevant legislative history of this provision, known as the Crosby Amendment. Pet. App. 12b-16b.

cide's use.[44] To the extent that Congress in 1972 intended the Administrator to continue to issue cancellation notices based on a finding of a substantial question of safety, it could not have anticipated that any person supporting cancellation could be "adversely affected" by a Section 6(b)(1) notice. It was only after 1975, when the procedure established by Congress required a risk-benefit balancing test[45]—instead of the earlier risk-only (substantial question) test—that a conditional cancellation notice, such as the Chlorobenzilate Notice, would fit within the statutory scheme. Although in 1975 Congress changed the threshold test for issuing a cancellation notice, there is no indication of any intention to change the focus of the Section 6(b) hearings.

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[44] The 1972 Senate Report stated:

> The procedures adopted carry forward the language of present law by which the Administrator cancels where a * * * substantial question of safety exists * * *.

S. Rep. No. 92-838, 92d Cong., 2d Sess. 12-13 (1972). This standard was interpreted by the court below in 1971 as requiring that:

> when * * * [the Administrator] reaches the conclusion that there is a substantial question about the safety of a registered item, he is obliged to initiate the statutory procedure that results in * * * a public hearing. * * * If hearings are held only after the [Administrator] is convinced beyond a doubt that cancellation is necessary, then they will be held too seldom and too late in the process * * *.

EDF v. *Ruckelshaus*, 439 F.2d 584, 595 (D.C. Cir. 1971). Accordingly, the court rejected the Administrator's proposal to conduct an informal "study of essentiality of particular uses and evaluations of potential substitutes" and required that any such study be conducted in a Section 6(b) hearing. *Id.* at 594.

[45] See H.R. Rep. No. 94-497, 94th Cong., 1st Sess. 6, 8-9, 54 (1975).

Finally, although EDF repeatedly urges that it is adversely affected by the Chlorobenzilate Notice, it is difficult to see how. As the court of appeals noted in its opinion:

> EDF [is] no worse off than it was before the notice of cancellation. As a matter of fact, EDF is better off. The cancellation of the uses of chlorobenzilate has gone into effect and to that extent EDF is better off than it was before the notice of cancellation issued. Prior to the issuance of the notice any decision not to cancel would have been subject to a district court review under section 16(a), and even now that many of the uses have been cancelled the decision to retain registration for other uses is still subject to district court review. Thus EDF has available to it the same remedies that it did prior to the notice of cancellation, and it is better off for the automatic cancellations of certain uses having gone into effect.[46]

Indeed, although the proposed cancellation may not have been as stringent as EDF may have liked, many uses of chlorobenzilate have been cancelled and none of EDF's rights have been lost. This result can hardly be the "adverse affect" contemplated in Section 6(b).

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[46] Pet. App. 33a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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